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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICUS CURIAE
(Genesee Foundry Company, Inc.)

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INDEX

Cases:

Statutes:

PAGE

Miscellaneous:

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INTEREST OF AMICUS CURIAE

The Genesee Foundry Company, Inc., a New York corporation employing about 90 employees at its manufacturing plant in Syracuse, is respondent in a proceeding pending before the National Labor Relations Board in Washington, D. C., involving facts similar in important respects to those in the case at bar.

In *Genesee* the intermediate report of the trial examiner states that the company wrongfully refused to bargain with a certified C.I.O. union despite the fact that a majority of the employees in the bargaining unit had expressly repudiated the union on September 28, 1953, which was three

months and four days after its certification. Such revocation of the union's bargaining authority took place after a series of negotiating conferences had not resulted in a contract with the company. The rejection of the union took the form of individually signed cards, whose authenticity was conceded, whereby a majority of the employees authorized an A. F. of L. union to be thereafter the bargaining representative, each card expressly stating that such authorization "supersedes any power or authority heretofore given to any person or organization to represent me . . ."

The company duly filed exceptions and a brief with the Board in Washington on March 31, 1954. The Board has not as yet handed down its decision.

Although the employees in *Genesee* repudiated the union more than three months after its certification, whereas the employees in the case at bar did so one day prior to certification (being seven days after an election), it is believed that the decision of this Court in the case at bar may well bear intimately upon the issues in *Genesee*.

SUMMARY OF ARGUMENT

Under the common law a collective bargaining agency is revocable at any time, and there is nothing in the National Labor Relations Act which in any way diminishes that principle. In fact, the Act expressly recognizes the right of employees to refrain from bargaining collectively. The Labor Board's so-called "one-year certification rule" is, in reality, not a rule but a gloss, often disregarded by the Board itself, and, when applied, amounts to an amendment of the Act, contrary both to its spirit and its text.

ARGUMENT

POINT I.

THE COMMON-LAW PRINCIPLES OF AGENCY ARE APPLICABLE TO REVOCATION OF A UNION'S BARGAINING AUTHORITY.

It is sometimes claimed that the legal concepts of principal and agent have no application to the relationship between employees and the union chosen by them to bargain with their employer. Those concepts, so the argument runs, are rooted in an era less "dynamic" than the present, and are alien to the modern burgeoning of "labor law."

However, those concepts are not to be swept aside as anachronistic in the labor field. They are very much alive and lend themselves to realistic application here as elsewhere.

Collective bargaining was not a creation of the Wagner Act, but was recognized by the courts long prior thereto. (*Amer. Foundries* v. *Tri-City Council*, 257 U. S. 184, 209.) The right of employees to select representatives of their own choosing for collective bargaining has been held to be "a fundamental right", which the Wagner Act "goes no further than to safeguard." (*Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 33.) Indeed, irrespective of the statute, this Court has said that, "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." (*Idem.*) In a subsequent opinion (*Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261, 263) this Court (*per* Mr. Chief Justice Hughes) cited the foregoing cases and stated that,

"Neither this provision [§ 7 of National Labor Relations Act], nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing." The Court added (p. 264) that it was "in recognition of this right" that Congress enacted the National Labor Relations Act.

Section 9(a) of the Act establishes the principle that a majority of the employees in an appropriate unit may bind the minority in designating or selecting a bargaining representative. In other words, the Act renders the representative, chosen by the majority, to be the representative of every employee in the bargaining unit. And the representative, when so chosen, must represent all employees in the unit with impartiality and with all the fairness and justice required of any agent. (*Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood*, 323 U. S. 210.) As stated by this Court in *Wallace Corp.* v. *Labor Board*, 323 U. S. 248, 255:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially."

See also, *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.

Is there anything in the Act which renders the agency, so created, irrevocable for any period? We believe not.

In the first place, the Board's mere certification of a bargaining representative does not, under the Act, effect

a status beyond recall. A certification under § 9 (c)(1) is merely a piece of paper certifying the result of an election conducted by the Board (General Counsel's Ex. 4; R. 30, 39). A certification is not in any sense a license or a prerequisite to bargaining, because employees may select a union without an election and the employer may recognize the union either on the basis of cards signed by the majority, or on the basis of other appropriate evidence submitted to him. A union so recognized is entitled to the protection of the Act and may, without any certification, lawfully contract with the employer. (See, *e.g.*, *Detroit Michigan Stove Company*, 51 NLRB 347; *Great Lakes Carbon Corporation*, 44 NLRB 70; *General Box Company*, 82 NLRB 678, 686.) Moreover, the holdings are numerous where the Board has ordered an employer to bargain, without an election and its resulting certification, when the employer had raised objections in bad faith to reasonable proof of authority tendered by a labor organization which a majority of his employees had actually designated as bargaining representative. (See, *e.g.*, *J. C. Lewis Motor Company, Inc.*, 80 NLRB 1134, enforced, 180 F. 2d 254.)

In the second place, the statutory provision (§ 9 [c] [3]) forbidding the Board to direct an election in any bargaining unit within which, "in the preceding twelve-month period", a valid election has been held, is obviously not a guaranty that a bargaining representative's authority cannot be revoked at any time by the express will of the majority of the very employees who first clothed the representative with authority. To be sure, such employees would be unable for twelve months to have the Board hold another election, but nothing in the cited provision of the Act forbids the employees to revoke a union's authority at any time, or makes it an unfair labor practice for an employer

to refuse to bargain with a union whose authority has been so revoked.

In the third place, the provision in § 9 (c)(1) of the Act, relating to the Board's power to direct an election whenever a petition has been filed "alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a)", is obviously not intended as the exclusive method for revoking a representative's authority. If Congress had intended such machinery to be the sole means of revocation, it would have so provided. Congress did not, as we have seen above, make an election and certification the only means of conferring authority to bargain collectively. (In fact, the provision just quoted envisages a situation where the bargaining representative is "currently recognized" but not "certified.") Likewise Congress has not sought to make an election the only method of revocation of bargaining authority. By including this section Congress guaranteed a means, especially practicable in large plants, for terminating a bargaining agent's authority. But there is nothing in the section to warrant the conclusion that every bargaining agency is irrevocable until there has been an election so resulting. The section makes no attempt to eliminate common-law methods of terminating an agency. And this is readily understandable because common-law methods are often more feasible in smaller plants, and less expensive to the taxpayers, than the cumbersome mechanics of a Board election.

Not only is there nothing in the statute making the agency irrevocable for any given period, but there is af-

firmative language in the 1947 amendments to the Act indicating that Congress intended that, equally with legislative recognition of the pre-existing right to bargain collectively, there should be statutory recognition of the right to refrain from bargaining collectively (§ 7). It would appear to follow that the right of the majority to refrain from bargaining collectively could be expressed at any time and, when so expressed, should prevail over the desire of the agent to have his authority continue.

Finally, under the facts at bar, there is no principle of common law barring the revocation of the agent's authority. The agency had not been executed, no contract with the employer having been signed. Nor had the power been given to the agent as security. Nor was the power coupled with an interest in its subject-matter. The possibility that a union might enjoy a check-off of membership dues under a future contract is not such an interest as would render the agency irrevocable, first because a check-off does not inhere in the power but would accrue, if at all, only after exercise of the power; and second because the agent's right to or his expectancy of compensation is never a bar to revocation of his authority. (2 Am. Jur., "Agency", §§ 77-84; 2 C. J. S., "Agency", §§ 73, 75; Restatement, Agency, §§ 118, 138-139; Civ. Code of Calif., Sec. 2356; *Graham* v. *Southern Ry. Co.*, 74 F. Supp. 663.)

A union as such does not acquire a vested interest in its representative capacity. The status of a union as such is strictly for the benefit of the employees, the whole spirit of the Act reflecting the protection of the rights of employees and not the conferring of benefits upon labor organizations as such. Indeed, this Court has pointed out that, under the Act, it is not essential that a labor organization be the

bargaining representative. The representative may be an individual. (*Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.) But whether the representative be an individual or a labor union, the Act contemplates that the representative have an eye single to the benefit of the employees. Since the Act is cast in terms of employee-protection, what greater irony could there be than its construction as requiring the retention of an unwanted agent?

POINT II.

THE BOARD'S "ONE-YEAR CERTIFICATION RULE" IS NOT A RULE BUT A VARIABLE DOCTRINE OF CONVENIENCE; BUT, VIEWED AS A RULE, IT WOULD EXCEED THE BOARD'S POWER BECAUSE CONFLICTING WITH THE ACT.

The Board on occasion refers to its "one-year certification rule," namely that, absent special circumstances, a certification binds the employees for "a reasonable period." This "reasonable period", where there is no bargaining contract, extends, says the Board, for one year from the certification date. (NLRB, Fourteenth Annual Report, 1949, pp. 22-23.)

However, no such "rule" has ever been promulgated as part of the Rules and Regulations of the Board. In reality this "rule" is merely an alleged doctrine, announced in certain Board decisions. But those decisions are so variable and inconsistent that it is impossible to escape the conclusion that there is no genuine doctrine on this score, other than one of convenience changing at the Board's will with the varying circumstances of each case.

The evanescent character of this doctrine is demonstrated by the fact that the Board finds nothing in the Act to prevent a holding that, where there has been no Board-conducted election, the employees may repudiate the bargaining representative at any time, in the absence of unfair labor practices which may have influenced the repudiation. (*Frigo Brothers Cheese Corp.*, 50 NLRB 464, 473. [In *Frigo*, as in the case at bar, the repudiation occurred within a week after the grant of authority to the agent.] See also, *National Labor Relations Board* v. *Mayer*, 196 F. 2d 286, 289-290.)

Nor has the Board hesitated to brush aside a certification within one year where a certified union dissolved or where, owing to a schism in the union or a defection of substantially the entire membership, the continued existence of bargaining authority fell into doubt. (*Public Service Electric and Gas Company*, 59 NLRB 325 [agency terminated after two months]; *Swift & Company*, 94 NLRB 917 [agency terminated after seven months].) Indeed, the Board in numerous cases of defection, schism, or transfer of allegiance has not allowed even a current contract to stand in the way of the termination of the agency. The Board has also said that, "We see no valid reason for giving more weight to a certification than to a contract under such circumstances. The certification of a collective bargaining representative by the Board is but the prelude to the making of an exclusive bargaining contract, the ultimate goal in the stabilization of labor relations." (*Carson Piric Scott & Company*, 69 NLRB 935, 938.)

Nor has the Board felt bound by a certification where within twelve months the employees transferred affiliation from one union to another. (*Brightwater Paper*

Company, 54 NLRB 1102 [agency terminated after two months]; *Carson Pirie Scott & Company*, 69 NLRB 935 [agency terminated after two months]; *Jasper Wood Products Company, Inc.*, 72 NLRB 1306 [agency terminated after three months].) If the Board is not impressed with the sanctity of its certification where employees change within a few weeks from one union to another union, why should a certification be held to prevent the majority of the employees from revoking an agency and refraining from bargaining collectively?

Nor has the Board felt bound by a certification where, within one year, it was demonstrated that a substantial reduction of personnel had resulted because of the employer's transition from war to civilian production. (*Electric Sprayit Company*, 67 NLRB 780 [personnel reduced about three weeks after certification].)

Nor has the Board felt constrained by a certification where the number of employees in the bargaining unit doubled or quadrupled within the "certification year." (*Westinghouse Electric & Manufacturing Company*, 38 NLRB 404; *Celanese Corporation of America*, 73 NLRB 864.)

The foregoing are deemed by the Board to constitute "unusual circumstances," which permit the termination of the agent's authority within less than one year from the date of certification. But we believe that a "rule", which is thus shot full of exceptions and unpredictable variations, does not possess the stability, uniformity, or consistency that would give rise to an "administrative construction," even assuming a statutory ambiguity which is not present. And, even if the "rule" were less mutable than it is, the Board exceeds its power in inventing a gloss which is tanta-

mount to a statutory amendment contrary to the philosophy and text of the Act as it came from the hands of Congress. Assuredly, when the Board forbids the majority to revoke the agency, the Board denies the right of the employees to refrain from collective bargaining, a right explicitly recognized in § 7 of the Act.

The case at bar is not like *Frank Bros. Co.* v. *Labor Board*, 321 U. S. 702, or *Medo Corp.* v. *Labor Board*, 321 U. S. 678, where the defection in union ranks was caused by the employer's unfair labor practices and where the employees had not revoked their designation of a bargaining agent.

In concluding this brief we submit that it is contrary to the spirit and intent of the National Labor Relations Act—it is contrary to the traditions of this nation—to prevent a majority from ending an agency they no longer desire. What momentous principle requires that they cannot revoke such agency? If the employees do not wish longer to leave their economic welfare in the hands of a given bargaining agent, why shouldn't they be permitted to revoke the agency? The agent has no vested interest which the principal cannot disturb. Certainly the National Labor Relations Act compels no such peonage.

CONCLUSION

The decree of the Court of Appeals herein should be reversed and the petition of the National Labor Relations Board for enforcement of its order should be dismissed.

Respectfully submitted,

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Amicus Curiae.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

* * * * * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and

proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).